

Leveraging SEPA Ideas from the Bucket 3 Group (Draft 9/25/08)

Bucket 3 Group Members: Tim Trohimovich, T.C. Richmond, Tayloe Washburn, Patricia Betts, Kari-lynn Frank, Susan Drummond, Valerie Grigg Devis, Carol Lee Roalkvam, Brenden McFarland

At the September 9 IWG meeting, members asked the Bucket 3 group to identify a subset of “leveraging SEPA” ideas that they felt were most promising and to describe them in greater detail. In particular, the Bucket 3 group was asked to provide information on how the idea would be implemented and what it would accomplish.

The attached ideas were put forward by one or more of the Bucket 3 group and then reviewed (via email) and discussed (via teleconference) with the rest of the Bucket 3 group members. These discussions did not resolve all uncertainties and disagreements among Bucket 3 group members (in part due to time constraints). The presence of an idea in this compilation does not imply endorsement by all of the members of the Bucket 3 group. Key uncertainties, disagreements, etc. raised by Bucket 3 team members were included in the attached write-ups.

At the September 30 IWG meeting, IWG members will be asked to decide whether and how to present these ideas to the CAT.

The ideas are listed below along with the “point person” asked to draft the write-up and the other members of the Bucket 3 group that identified the idea as one they want to move forward to the full IWG:

1. Exemptions - SEPA’s Strongest Incentive (Susan-drafter, Tayloe)
2. Upfront SEPA (Tayloe-drafter, Tim, T.C., Susan, Patty)
3. Mitigation – Voluntary Mitigation List and “Green List” Projects (Brenden-drafter, Susan, Patty, T.C)
4. Leveraging Existing Categorical Exemptions (Tim-drafter)
5. Future Vulnerabilities/Adaption Measures (T.C.-drafter, Tim)
6. Regional Planning (Patty-drafter, Tayloe)

Bucket 3: Incentives and Disincentives for Leveraging SEPA

Name: 1. Exemptions - SEPA's Strongest Incentive (Drafter: Susan Drummond)

Description of idea:

Exemptions are a powerful tool for encouraging climate friendly development. They reduce project risk and costs associated with both litigation and preparing SEPA documents. When carefully drafted, they can help achieve the objectives of local government, environmental interest groups, and developers.

To utilize this strategy, SEPA would be amended to authorize jurisdictions to provide a "neighborhood, district-level exemption." This would be for municipally designated areas within UGA's, where property owners agree to comply with statutorily set minimum sustainable development standards. The standards would require compact, connected, walkable neighborhoods, with good jobs ratios, open space, a wide variety of uses, and transit supportive residential densities; and high performance buildings and infrastructure. To fully leverage the exemption, it would apply to both the government's "neighborhood designation" decision and implementing development projects.

This exemption could be a new statutory section, or RCW 43.21C.229 could be revised to incorporate this approach. RCW 43.21C.229 exempts residential and mixed use development within an urban growth area, if an EIS has been prepared for the comprehensive plan, and development does not exceed the plan's goals for density and development intensity. The revisions would establish sustainable development pre-requisites, expand the uses the exemption applies to, but limit its applicability to municipally established "districts." The language providing for a plan EIS would not apply, because more comprehensive criteria would be set for meeting the exemption.

Areas of disagreement, uncertainty or ongoing discussion: Questions raised are ensuring jurisdictions can require adequate mitigation, in cases where they have traditionally relied on SEPA; and ensuring that if new issues arise, the municipality has the ability to address them. Also, the exemption language will need to be carefully drafted, and would include specific statutory criteria to address the full range of environmental impacts.

What this idea will accomplish: The exemption: 1) makes SEPA's approach to climate clear and predictable, and reduces future litigation; and 2) is the most powerful incentive SEPA has available for reducing greenhouse gas emissions and future impacts related to changing climate.

Strengths and weaknesses of idea: See description above, and questions to be addressed.

How this idea could/would be implemented: Local jurisdictions would implement this strategy, by designating the geographic area the exemption would apply to, in concern with property owners, and consistent with statutory criteria. Future development within the district would then be required to comply with the sustainable development standards.

Description of necessary funding or changes to statute/rules: Statutory amendment needed. No new funding necessary.

Additional information or analysis needed: Draft legislation.

Bucket 3: Incentives and Disincentives for Leveraging SEPA

Name: 2. Upfront SEPA (Drafter: Tayloe Washburn)

Description of idea: Allow cities to elect to designate a subarea for more compact commercial, residential, mixed use or industrial development ("Subarea"). If the city: 1) designates the Subarea; 2) conducts thorough SEPA review (EIS) of the Subarea which is a maximum build-out analysis that identifies mitigation steps to address significant environmental impacts (including climate change impacts); and 3) adopts as new Subarea development regulations that incorporate and require the climate change mitigation and any other mitigation identified in the Subarea SEPA review that is not already addressed in development regulations, then all subsequent development in the Subarea would be required to implement the climate change measures and would be exempt from any project-level SEPA or SEPA appeals. As with Planned Actions, a verification step would occur at the project stage (e.g. review an environmental checklist to verify the project meets the description and regulations and that no unanticipated significant adverse environmental impacts are associated with the project).

Developers would be required to pay their proportionate share of the Subarea SEPA review. Ideally this approach would be an improved form of Planned Actions with an upfront funding mechanism.

Areas of disagreement, uncertainty or ongoing discussion: Planned actions are a very good idea in concept but have had some challenges in implementation. Any solution should be designed to address implementation challenges associated with Planned Actions.

Since proposals can have many impacts, not just impacts to climate, the planning phase analysis would need to address all environmental issues with subsequent development implementing those measures. Whether and how planned actions, or a similar proposal, can address unknown, but significant, future environmental impacts or scientific uncertainty over global warming and the necessary responses is a concern.

It is unclear whether this could fit in with Planned Action requirements and/or only require some minor modification.

What this idea will accomplish: This idea will encourage and support good, non-project environmental analysis, which is where we can best use SEPA to address the incremental/cumulative effects of GHG emissions. It will provide predictability to proponents and to the public. It provides more predictability about the quality of the environmental analysis because an EIS will be prepared and links implementation of mitigation between the non-project and project. Properly implemented, this idea will also help jurisdictions decide what appropriate development looks like for a particular area, given the environmental issues of that area, while non-project or project planning is in the design phase.

Strengths and weaknesses of idea: Mithun's latest analysis concludes that land use related greenhouse gas emissions could be reduced through density, compared to business as usual, as part of the movement to state 2040 desired levels. Generally speaking, the current approach (low density) reduces

these land use GHG emissions by 6%, a medium density reduces it by 12% and a high density by 23%. In areas in which there is a market and a jurisdiction completes the steps, this will create a very powerful incentive for developers to step up and invest sooner than would otherwise be the case.

How this idea could/would be implemented: This idea would occur as part of a local agency's planning and would focus on a sub-area in the jurisdiction. This approach provides an alternative process from the standard SEPA process for project level environmental analysis and threshold determination.

Description of necessary funding or changes to statute/rules: A key challenge will be to identify the upfront funds to enable interested jurisdictions to conduct the subarea SEPA review. These measures would require initial financing/loan to assist participating cities with the upfront cost of Subarea SEPA review; this cost would be reimbursed over time by developers. Perhaps there could be some kind of revolving account that would be reimbursed as developers pay on the loan.

These measures may require amendments of SEPA provisions and rules.

Additional information or analysis needed: None

Bucket 3: Incentives and Disincentives for Leveraging SEPA

Name: 3. Mitigation – Voluntary Mitigation List and “Green List” Projects (Drafters: Kari-lynn Frank, Brenden McFarland)

Description of idea:

Mitigation measures that adequately address greenhouse gases (GHG) up front are one way in which the State can create a clear path for project proponents to meet their obligations for GHG reductions. This type of mitigation strategy can reduce the administrative burden of the State while still allowing for goal attainment. By creating relatively clear and unambiguous options for compliance, the State would be incentivizing respondents to fulfill their climate change duties.

Programs for GHG emission mitigation or mitigation measures which, if included in a project proposal, could provide certainty that greenhouse gases (GHG) impacts are addressed, and thus fully or partially exempted from further GHG reduction requirements. For example, specific mitigation measure and programs could be included on a “Green List”. “Green List” projects (or project types) would be considered a positive contribution to the State’s efforts to reduce GHG emissions, and as such would be exempted from further mitigation measures. Additionally, aspects of projects or programs may have recognized mitigation impact, and as such would be given a mitigation value that would reduce or eliminate the need to further address GHG (a mitigation alternative list). One potential mitigation category is as follows:

Project alternatives in design and/or construction: Includes voluntary alternatives such as LEED/Green Globe certification and strategies; construction-transportation techniques; use of recycled materials, waste reduction, local materials; urban in-fill, Brownfield development; and use of VMT-limiting elements such as high transit use and work-live space.

Areas of disagreement, uncertainty or ongoing discussion:

This idea may be subject to uncertainty relative to science and policy. First, rapidly changing scientific evaluative techniques may lead to instability in the valuation of mitigation alternatives. This weakness may over or under inflate the value of such an alternative. Second, the trade-offs inherent in potential inclusions (particularly “Green List” inclusions such as on-site energy production) will need to be debated in the public arena, and, as such, will be subject to evolving community values.

What this idea will accomplish:

This idea will accomplish two primary objects: First, it will make SEPA’s approach to climate clear and predictable and reducing future litigation. By laying out a clear path for compliance through a “Green List” or a list of project/program aspect with mitigation value, the process will be simplified for respondents. This “user friendly” framework will encourage its use.

Second, by encouraging the use of a “Green List” approach GHG production will be reduced in the present and impacts related to changing climate will see a net benefit into the future. It can only logically follow that if projects are reducing their GHG footprint then there will be an effect going forward.

Strengths and weaknesses of idea:

This idea has several strengths. First, it provides a very clear path in which a project proponent can comply. Second, to the extent that the mitigation measures are voluntary, it provides an incentive for participation. Third, this idea also provides a catalyst for important public policy debates regarding the priorities of the State or local jurisdiction. Fourth, the simplicity of using a “Green List” will reduce the administrative burden typically associated with new initiatives.

The weaknesses of idea are threefold. 1) As discussed above, there are questions as to the valuation of mitigation alternatives given the nature of the underlying science. 2) Also discussed above was the concern over policy considerations with specific potential “Green List” inclusions. 3) The question of at what level of government or with what guidelines the development of specific inclusions to the “Green List” or the mitigation alternative list would need to be settled.

How this idea could/would be implemented: The “Green List” and mitigation alternative list could be implemented through the checklist. That is, if a project was included on a “Green List” it would simply note that on the form. Additionally, a project proponent would denote the mitigation alternatives it was implementing along with the value of that alternative and that would satisfy the documentation requirement.

Description of necessary funding or changes to statute/rules:

Could be implemented through SEPA or non-SEPA legislation

Additional information or analysis needed:

Critical to this concept is the mitigation value of the specific mitigation alternative or “Green List” inclusion. The lists would need to be developed and valued prior to implementation. Amendments to the underlying lists could be made on an ongoing basis.

Bucket 3: Incentives and Disincentives for Leveraging SEPA

Name: 4. Leveraging Existing Categorical Exemptions (Drafters: T.C. Richmond and Tim Trohimovich)

Description of idea: Amend the SEPA regulations to limit the application of certain existing categorical exemptions to encourage desired actions, such as targeting areas for development or the planning for GHG emission reductions consistent with RCW 70.235.020(1)(a). The amendments could condition the application of the categorical exemption in manner that would provide incentives to the project proponent and local jurisdictions to plan for actions that achieve GHG reductions. Categorical exemptions for certain actions could also be reduced in scope or eliminated. These amendments would target existing categorical exemptions that are most likely to allow actions that, individually or cumulatively, generate large quantities of unmitigated GHG emissions.

Areas of disagreement, uncertainty or ongoing discussion: There was no consensus reached on this option. Concern was raised that there will be resistance to modifying or eliminating any existing exemptions.

What this idea will accomplish: The focus of this concept is to provide incentives to plan for GHG reductions while limiting the application of existing categorical exemptions that are most likely to promote actions with unmitigated GHG emissions. Reducing the scope of categorical exemptions would also result in decreased GHG emissions through increased SEPA mitigation.

Strengths and weaknesses of idea: Since regulations do not cover many GHG emissions, repealing exemptions, modifying exemptions, or limiting them to jurisdictions with GHG reduction plans would further SEPA's umbrella and gap filling role. It is possible to decide on the exemptions to address using data and available scientific information. No particular science or tool is required, retaining the flexibility to use better tools. Would be understandable. Would increase agency workloads, although probably not so much that it is infeasible. It would encourage actions to address climate change. The changed exemptions would apply statewide, achieving consistency and predictability. Ecology would have an increase in its initial workload and in litigation risk in determining which categorical exemptions should be subject to the limitation of jurisdictional planning; but once established by rule, the workload and litigation risk would be minimal. The changes may expand the actions subject to SEPA and, therefore subject to SEPA litigation. If the changes are well chosen then the litigation is not unnecessary. If chosen poorly, then some litigation may be unnecessary. Will increase costs for agencies and action proponents. Fees could pay for some agency costs. Will be controversial. Some exemptions are not used very often and so repealing them may not reduce GHG much. Others are frequently used and their repeal may significantly reduce GHG emissions. Some categorical exemptions are not based on any evidence as to their environmental impact, so an evidence-based look at the exemptions could provide for broad environmental benefits.

How this idea could/would be implemented: Either legislative amendment or Ecology amendment to categorical exemptions in RCW or WAC. Since nearly all of the categorical exemptions were adopted by rule, an Ecology rule amendment is the most effective.

Description of necessary funding or changes to statute/rules: Use existing agency resources or obtain funding for an Ecology rule amendment to the categorical exemptions in the Washington Administrative Code (WAC).

Additional information or analysis needed: Which exempt actions are generating, individually or cumulatively, large quantities of GHGs?

Bucket 3: Incentives and Disincentives for Leveraging SEPA

Name: 5. Future Vulnerabilities/Adaption Measures (Drafter: Tim Trohimovich)

Description of idea:

Studies show that Washington is already experiencing the adverse effects of global climate change. As global warming continues we will experience flooding due to sea level rise and more winter precipitation falling as rain rather than snow. Our water supplies will be reduced and we will experience many other impacts. SEPA can be used to assess and reduce the impacts of these existing and future vulnerabilities on proposed actions. This could be done by:

- > Continuing to fund research into the probable effects of global warming.
- > Continuing to synthesize research into the probable effects of global warming and provide to decision makers.
- > Providing guidance on how to anticipate and mitigate the adverse effects of global warming as part of SEPA review.
- > Amending the SEPA rules to require an analysis of the adverse impacts of global warming on the proposed action as part of an EIS. This may already be required, but is not explicitly identified as a requirement.
- > Amending the SEPA rules to require that EISs must include and analyze an alternative that would be minimally effected by the adverse impacts of global warming.
- > Requiring reopeners or contingent mitigation for uncertain, but high cost impacts. Some impacts, such as what will be the future flood heights in or near our current flood plains, are unknown but will have significant adverse impacts on proposed actions. The SEPA rules could be amended to require reopeners or contingent mitigation that would require an analysis of this impact if an event occurs or when information becomes available. Or a reopener or contingent mitigation could be imposed as an MDNS or EIS mitigation requirement. For reopeners or contingent mitigation to work, monitoring would be required and a contingency plan prepared that includes identified, implementable, and effective mitigation. The contingency plan would have to be identified up front with the required monitoring.

These could be mitigation measures that if included in a project proposal would provide certainty that greenhouse gases (GHG) impacts are fully or partially exempted from further GHG reduction requirements. Or they could be required mitigation that some or all non-project or project actions would have to implement. Some options, such as funding research or the synthesis documents, could be information that is made available to action proponents and the proponent could choose to act based on the information or not.

Areas of disagreement, uncertainty or ongoing discussion: Whether additional SEPA exemptions are desirable. Whether additional SEPA requirements are desirable. These options could be voluntary, incentives for an exemption, or required. Whether the requirement for more analysis or another alternative should only be required for non-project EISs? Whether reopeners should be applied to project actions or even any actions?

What this idea will accomplish: This proposal will reduce the adverse impacts of climate change on project and non-project actions. This will increase protection for people and property and reduce future costs for proponents and the public. For example, siting a building or highway outside an area likely to be inundated by sea level rise will save lives and reduce property damage.

Strengths and weaknesses of idea: Since regulations do not cover many GHG emissions, requiring an analysis of the impact of global warming on the proposal, a least impacted alternative, reopeners, or mitigation would further SEPA's umbrella and gap filling role. These measures would be linked to available scientific information and methods. No particular science or tool is required, retaining the flexibility to use better tools. Would be understandable. Some options would reduce agency discretion. These measures could apply statewide, achieving consistency and predictability. Litigation may be avoided, but there may be litigation over whether these requirements are being met. May increase SEPA compliance costs, but decrease operation and maintenance costs, and the need to relocate or replace a project. Some options will be controversial. Others would not. Would better protect people and property. An incentive that allowed an exemption from further greenhouse gas emission review may mean that a project or nonproject action may avoid being impacted by the adverse effects of global warming, but may generate significant amounts of greenhouse gas emissions. Reopeners increase uncertainty and may make some project actions infeasible.

How this idea could/would be implemented: See the description of the idea above.

Description of necessary funding or changes to statute/rules: Some options, such as funding research or preparing synthesis reports, would be information made available to action proponents. Guidance on how to determine future effects would be a guidance document. Others would require amendments to the SEPA rules. Additional research and synthesis reports, and the guidance would require additional funding. The SEPA rule amendments and the SEPA amendment may or may not require additional funding.

Additional information or analysis needed: 1. What global warming impacts should trigger the reopeners or require contingent mitigation? 2.a When would a reopener occur, after the proposal is implemented? 2.b. How would the new analysis be used? 2.c. Would the proponent have to shut down the project?

Bucket 3: Incentives and Disincentives for Leveraging SEPA

Name: 6. Regional Planning (Drafter: Patricia Betts)

Description of idea: Develop and adopt a regional or statewide Climate Change Plan (GHG Reduction Plan) that would identify the broad direction of the state/region. It can be incorporated into local planning and environmental analysis. As part of that Plan process, prepare a state-wide EIS on GHG emissions, impacts, and mitigation that can be adopted into local plan-level EISs.

The state-wide EIS would be prepared anticipating its use for local planning SEPA analysis. The state-wide/regional plan could identify regional targets and identify alternative ways that local agencies could translate the regional targets into local plan and project level environmental analysis and significance thresholds. If the regional analysis is done separately, another product/effort would need to be implemented to ensure the regional piece is done and that it is consistent with the statewide effort.

Areas of disagreement, uncertainty or ongoing discussion: There has not been a lot of discussion. This approach is a very good one in theory but can have challenges during implementation. For example, the products of regional planning could be flawed/incomplete and not provide the information that local jurisdictions need. Or local and state agencies could decide they disagree with the product and do very little or something completely different. Local/state agencies could use the information inappropriately to meet the basic requirements, without effectively accomplishing the purpose of addressing climate change. In those cases, there would be no efficiencies or effectiveness achieved.

The products of this idea could be “tested” to ensure their usability for agencies of varying size. The products would need to include good tools/direction on how to incorporate into local planning and project analysis. This idea would benefit from some mandatory procedural “checks” to make sure they are appropriately implemented to achieve GHG reductions.

On commenter noted that he needed to give more thought to the plan consistency requirement. He had thought of this as more of a SEPA EIS product analyzing a range of climate change issues at the regional or state level, and as a product smaller jurisdictions could adopt this analysis by reference for whatever efforts they are undertaking. A consistency requirement, he felt, is a little more directive, and may engender opposition by local governments for a variety of reasons. It also could turn out to be a litigation opportunity. He felt this issue raised the larger question of what climate change specific standards, if any, will be proposed by CAT or others. Who will develop them? He said the larger SEPA IWG and CAT are or will zero in on these, and whatever outcome is reached will have to circle back to this Regional Planning piece.

What this idea will accomplish: This idea will: 1) assist local jurisdictions to address GHG emission and climate change issues, 2) help ensure that climate change is addressed at all levels of government, and 3) increase consistency and predictability for the public and applicants.

A state level plan and environmental analysis will save money by eliminating duplication. Other agencies can use the work rather than recreate it. It will reduce challenges, because once the state plan and analysis is completed and has passed any challenges that might arise, it will be a solid foundation for other jurisdictions to build on. Applicants will be happier, because approaches and requirements across the state will be more similar and predictable. Also, their proposals/permits will be more defensible and less likely to fail a challenge. The public will have more confidence in a smaller jurisdictions adherence to SEPA if the smaller jurisdiction uses the statewide documents as their foundation.

Local consideration of GHG emissions/climate change will have a greater chance of getting done and getting done correctly by jurisdictions, if they have assistance in the form of cost savings and useful information/environmental analysis. A statewide plan and environmental analysis will help us make sure we have looked at all the issues together so when local work is done it will be part of a bigger plan that makes sense and has been thoughtfully prepared to be effective.

When this approach includes regional targets and alternatives for implementing those regional targets, it would provide the middle step that connects the high level planning with local level planning and projects.

Strengths and weaknesses of idea: This activity would require no changes in laws/rules but would require substantial funding for the statewide effort. But, it could definitely be incorporated into any statewide plan that might be underway. Producing the document would take some time and would be less useful, the longer it takes. Cost would be even higher, if we try to shorten the time.

It supports SEPA's purpose to address gaps and would be flexible to accommodate new science and tools. If implemented as intended, it would increase appropriate analysis and good proposals. It would particularly help jurisdictions with funding or climate change/SEPA technical expertise challenges. And it would save agency time during planning.

Since the plan would include an EIS, some level of assurance that the plan itself has properly conducted SEPA might be inherent.

How this idea could/would be implemented: A specific agency would be assigned for developing the statewide/regional plan and preparing the programmatic EIS. They would coordinate heavily with current regulatory efforts to address climate change, as well as with all stakeholders. The effort would include SEPA templates/guidance for implementation (SEPA analysis) at the local level. The statewide analysis and plan would then be used during local and state planning (e.g. comprehensive planning, transportation planning, forest planning, etc.).

Description of necessary funding or changes to statute/rules: Funding would be a critical need for this effort. No statutory or rules changes would be required although they may be important to ensure the product is effective. Rule changes could include: a requirement for consistency with the plan.

Additional information or analysis needed: A well-thought out plan, that considers how this statewide/regional plan and environmental analysis will translate down to the later planning and project levels, would be essential for ensuring this product is useful and used by state and local agencies.

Need to define “region”. Does it mean one county, does it mean a group of counties that could have similar situations or similar approaches for addressing climate change. Or, a region might be a group of counties working together to translate their regional amounts into jurisdictional emission amounts and formulas for local planning and permitting (Regional transportation planning organizations or MPOs?).